

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID R. DIPLEY

Claimant

VS.

CHEF SOLUTIONS, INC.

Respondent

AND

**ST. PAUL FIRE & MARINE INSURANCE
COMPANY**

Insurance Carrier

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Docket No. 1,021,034

ORDER

Claimant appeals the April 5, 2006 Award of Administrative Law Judge Kenneth J. Hursh. Claimant was awarded benefits for a 5 percent permanent partial disability, but denied work disability. The Appeals Board (Board) heard oral argument on August 2, 2006.

APPEARANCES

Claimant appeared by his attorney, Michael H. Stang of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Rex W. Henoch of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

What is the nature and extent of claimant's disability? More particularly, did claimant's injury constitute a traumatic hernia pursuant to K.S.A. 44-510d(22)? If so, should claimant be limited to a maximum of 12 weeks of temporary total disability compensation and medical treatment pursuant to K.S.A. 2003 Supp. 44-510h and

K.S.A. 2003 Supp. 44-510i? If claimant's injury is not a traumatic hernia, and claimant is entitled to additional permanent partial disability benefits, is claimant limited to a functional disability award for failing to put forth a good faith effort to retain his employment with respondent, or is claimant entitled to a permanent partial work disability pursuant to K.S.A. 44-510e?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

Claimant, a maintenance mechanic for respondent, began working there in November 1999. He was terminated on November 4, 2004, for alleged excessive absenteeism. On June 11, 2004, claimant was injured when he tried to catch a 150-pound motor which had slipped. Claimant reached for the motor and slowed the motor's descent to the ground. However, when he did this, he felt a little burning in his stomach. He had never felt that burning prior to June 11, 2004. Claimant reported the accident the next day, but he was not sent to a doctor at that time. The first time claimant was sent to a doctor for this injury was on July 12, 2004, when he saw Dennis A. Estep, D.O., at the Freeman Occupational Medicine Clinic.

Between June 11, 2004, and July 12, 2004, claimant continued to work. Claimant testified that during that period, he asked numerous times whether respondent was going to send him to a doctor because of the problems he was continuing to experience, including soreness and a burning sensation in the side of his stomach. Claimant further testified that during this period of time, he was still expected to pick up motors and perform other heavy lifting activities.¹ The burning sensation affected his ability to lift weights, and claimant did not do it so as not to flare up the injury. Lifting weights was an important part of his job with respondent.

Claimant saw Dr. Estep on July 12, 2004. Dr. Estep put claimant on a 25-pound lifting restriction. Claimant testified that respondent did not accommodate those restrictions, although this testimony is contradicted by respondents's representatives who testified in this matter. Because claimant was afraid he would be fired if he did not continue to do his normal job, he worked outside of those restrictions. Claimant stated that human resources would pull him in and tell him to be careful. But respondent's lead men expected claimant to do the work. And claimant did not want to get fired for being insubordinate.

¹ R.H. Trans. at 10.

Claimant saw Dr. Estep again on July 26, 2004. On that date, he released claimant to full duty with no restrictions. Claimant testified that when Dr. Estep examined him on that date, all he did was poke claimant in the stomach and ask him if that hurt. Claimant told him that it did hurt. Dr. Estep asked claimant if it was tender, and claimant responded, "Yeah, it's tender."² Claimant testified that it does not hurt unless he picks something up. Dr. Estep, who diagnosed an abdominal wall strain only, did not prescribe physical therapy or medication. The only treatment provided by Dr. Estep was to put claimant on restrictions from July 12, 2004, through July 26, 2004.

Claimant testified that between June 11, 2004, and July 12, 2004, his condition got worse. From July 12, 2004, to July 26, 2004, while he was on restrictions, but expected to exceed them, he became sorer and sorer. Between June 11, 2004 and July 12, 2004, he did not miss any time from work. The first time he missed work was sometime in August 2004.

At the time of his July 26, 2004 release, claimant testified that he was still having problems due to the injury, including soreness and pain, and the burning sensation. His condition had not improved at all. However, the July 26, 2004 report of Dr. Estep indicated claimant reported no pain or bulging, and claimant displayed no bruising, redness or edema. Claimant was returned to work without restrictions and told to return on a PRN basis. There is no indication in Dr. Estep's records that claimant ever returned for added treatment.

After being released by Dr. Estep, claimant continued to work in his regular capacity, but he was self limiting his lifting. As he continued to work, his condition did not improve. He was still having soreness, and that affected his ability to do his job, slowing him down considerably.

Claimant started missing work because of the pain. Claimant testified that during the period July 26, 2004, until November 2004, he did not miss work for any reason other than his abdominal condition. Claimant testified that he reported his continuing problems to respondent, but he was not offered treatment.

On November 4, 2004, claimant was terminated for excessive absenteeism. There were a number of instances before this date where claimant left work early or was absent, and for these absences, he accumulated points which were in excess of the maximum threshold allowed under respondent's attendance policy. Claimant contends that these absences were due to continued abdominal pain.

² *Id.* at 15.

Pam Talbert, respondent's human resources representative, testified regarding claimant's absences and resulting termination. Ms. Talbert, whose duties include responsibility for workers compensation case management, testified that from July 12, 2004, through July 26, 2004, claimant was on light-duty work, and that he was released to full duty on July 26, 2004.

Ms. Talbert testified that the termination threshold is seven points, and that claimant had accumulated seven points when he was terminated. Once an employee accumulates seven points, the employee is subject to termination. Effective November 4, 2004, claimant had reached that seven-point threshold.

Records were maintained by respondent as to any time that claimant missed time from work. After reviewing these records, Ms. Talbert found no record of claimant, at any time prior to his termination, missing time from work because of his medical condition.

There was a medical log in the medical office that was used by employees to enter information regarding injuries. Claimant testified that if injured, employees were supposed to write it down in that log. Ms. Talbert stated that she would check the entries in that log periodically to see what was entered and who entered it, and to see if she needed to follow up with them. On reviewing these reports periodically, Ms. Talbert saw that claimant was continuing to have problems with his abdomen. However, when claimant was asked on August 12, 2004, if he needed to be sent for an evaluation, he said no.³

Ms. Talbert confirmed that entries were made into the medical log regarding complaints made by claimant of abdominal pain on August 12, 2004, September 16, 2004,⁴ and October 8, 2004. Also there is a nurse's note that says on June 30, 2004, claimant stated that he felt a pull to his abdomen.

Ms. Talbert testified that claimant was late on October 1. However, there is no record of this in the exhibits. Claimant was absent on September 27, 2004, for a reason noted by respondent as personal. He was absent from work on October 7, 2004, for a reason noted by respondent as personal. And on October 20, 2004, claimant received a half point for being late. As of that point, he had accumulated five points. None of the dates listed by claimant on the medical log coordinate with dates where claimant was assessed points for being tardy or absent. A written warning was issued to claimant for

³ Talbert Depo. at 25-26.

⁴ An entry was made on September 17, 2004, regarding a September 16, 2004 incident.

the late arrival on October 20.⁵ This report states claimant will be subject to a three-day suspension if he receives another full point before earning a bonus point.

On November 2, 2004, claimant took all of his tools with him when he left work. Claimant had never done that before. The next day, November 3, 2004, claimant returned with his tool belt and, then left work early for a reason noted as illness. Then, again on November 4, 2004, claimant returned with his tool belt, worked for part of the day, and left work early for a reason noted by respondent as personal. Ms. Talbert testified that as he was leaving, claimant commented to co-workers, "Well, that's seven, I'll see you later."⁶

Ms. Talbert testified that claimant's restrictions were accommodated, although she admitted she had no firsthand knowledge regarding this. She feels that claimant's restrictions were accommodated because of the procedures the company has in place. Ms. Talbert testified that based upon her recollection and in looking at the work planner, claimant was assigned primarily to the maintenance shop area, sorting and organizing nuts and bolts.⁷ However, she was not in a position to confirm or deny whether or not claimant's supervisors asked him to exceed his restrictions. She did testify that supervisors are notified of an employee's restrictions.

Testimony was provided by Michael Wilcox, who was respondent's plant engineer in charge of maintenance. Mr. Wilcox testified regarding the light-duty restrictions claimant was on from July 12, 2004, through July 26, 2004. However, according to Mr. Wilcox's own testimony, as well as the testimony of Ms. Talbert, Mr. Wilcox was not at work at that time. According to Ms. Talbert, Mr. Wilcox did not work from approximately June 29, 2004, through December 16, 2004, as he was off on medical leave, undergoing back surgery.⁸ Mr. Wilcox no longer works for respondent, testifying that he is retired.

Claimant testified that between July 26, 2004, and November 4, 2004, respondent was harassing him by changing his hours and the job he was supposed to do. He identified Mike Wilcox as the person changing his hours. He also testified that Mr. Wilcox threatened him, saying to claimant that he (Mr. Wilcox) was "going to knock me out".⁹ Again, it is noted that Mr. Wilcox did not work for respondent during the time period from July 1, 2004, through claimant's termination on November 11, 2004.

⁵ Talbert Depo., Ex. 3 at 13.

⁶ *Id.* at 38.

⁷ *Id.* at 9-10.

⁸ *Id.* at 48.

⁹ R.H. Trans. at 46.

Since claimant's termination, he has looked for work. Claimant stated that he made contacts with various employers three or four times a week. Claimant was unemployed for about a year. Then, on November 3, 2005, he obtained employment at a company by the name of Protein Solutions. At Protein Solutions, claimant works as a maintenance mechanic, performing lighter duty work than he performed at respondent. Claimant's stipulated average weekly wage at Protein Solutions is \$721.15.

On February 24, 2005, claimant was seen by Michael J. Poppa, D.O., board certified by the American Osteopathic Board of Preventive Medicine, for an independent medical evaluation at the request of his attorney. At that point, Dr. Poppa indicated claimant was at maximum medical improvement. He rated claimant as having a 10 percent permanent functional impairment to the body as a whole for the abdominal wall strain, utilizing the fourth edition of the *AMA Guides*.¹⁰

On July 5, 2005, claimant saw Terrence Pratt, M.D., board certified in physical medicine and rehabilitation, for a court-ordered independent medical evaluation. Dr. Pratt found claimant to be at maximum medical improvement. Utilizing the fourth edition of the *AMA Guides*,¹¹ he found claimant to have suffered a 5 percent impairment to the whole body. Neither Dr. Pratt nor Dr. Poppa described claimant's condition as a traumatic hernia. Both described it as a muscle strain. Although they did indicate if the abdominal wall had developed a hole, claimant's condition would be described as a hernia. But, as it did not, it was merely an abdominal wall strain.

The ALJ concluded that the opinion of Dr. Pratt should be given greater weight and awarded claimant a 5 percent impairment to the body as a whole. The Board agrees and affirms an award of a 5 percent whole body permanent partial disability.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹²

The Board finds that claimant's condition is not a hernia and, therefore, is not limited by K.S.A. 44-510d(22). Neither doctor who testified in this matter identified it as such. The legislative limits in K.S.A. 44-510d(22) do not include abdominal wall strains with hernias.

¹⁰ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

¹¹ *AMA Guides* (4th ed.).

¹² K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.¹³

. . . when legislative intent is in question, we can presume that when the legislature expressly includes specific terms, it intends to exclude any terms not expressly included in the specific list.¹⁴

The Board, therefore, finds claimant is entitled to a permanent partial general disability award under K.S.A. 44-510e.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.¹⁵

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*¹⁶ and *Copeland*.¹⁷ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all

¹³ *Matter of Marriage of Killman*, 264 Kan. 33, 42, 955 P.2d 1228 (1998) (citing *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 855 P.2d 956 [1993]).

¹⁴ *Id.* at 42 (citing *State v. Wood*, 231 Kan. 699, 647 P.2d 1327 [1982]).

¹⁵ K.S.A. 44-510e(a).

¹⁶ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

¹⁷ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

the evidence before it, including expert testimony concerning the capacity to earn wages. . . .¹⁸

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both the claimant and the respondent.¹⁹

In this case, claimant worked for respondent until November 4, 2004. On that date, due to an accumulation of negative attendance points, claimant was terminated from his employment. The events leading up to claimant's termination lead the Board to believe that claimant was not acting in good faith. An exhibit to the Talbert deposition verifies that claimant was aware of his precarious attendance position.²⁰ Yet, he still created two instances which would be guaranteed to generate added attendance points against his employment record. Claimant's actions on November 3 and 4 were not explained in this record. Additionally, claimant's comments to his co-workers on November 4 indicate a cavalier attitude toward future employment. Respondent's representatives indicated a willingness to continue accommodating claimant's restrictions but for the termination. The Board cannot find claimant's actions leading up to the termination were in good faith.

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.²¹

The Board finds claimant's actions leading up to his termination do not constitute a good faith effort on claimant's part to retain his job with respondent.

Therefore, after imputing the wage claimant would have received if he had remained employed with respondent, the Board affirms the ALJ's decision to limit claimant to his functional impairment.

AWARD

¹⁸ *Id.* at 320.

¹⁹ *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

²⁰ Talbert Depo., Ex. 3.

²¹ K.S.A. 44-510e.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 5, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Rex W. Henoch, Attorney for Respondent and its Insurance Carrier